IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.387 OF 1984

1. Manikchand Pannalal Gelda
(since deceased through his heirs)
1A. Smt.Kanchanabai Manikchand Gelda
1B. Dilip Manikchand Gelda
1C. Smt.Jayshree Paras Gelda
1D. Puja Paras Gelda
1E. Keyur Paras Gelda
(Appellant Nos.1D to 1E minor through
their mother and natural guardian)

1F. Sou.Pratibha Pannabal Kothari
1G. Gautam Manikchand Gelda
1H. Champalal Manikchand Gelda ...Appellants

Versus

1. Dattu Khushaba Shivale
2. Baban Bholu Shivale
3. Namdeo Bholu Shivale
4. Maruti Bholu Shivale
5. Bayodabai Dnyanoba Mohite ...Respondents

Mr.P.B.Shah for the Appellant
Mr.C.R.Dalvi for Respondent No.1 to 5.

CORAM: A.S.OKA, J.

DATED: JULY 21, 2004.

ORAL JUDGMENT :

1. Second Appeal was admitted on 14th August 1984. At the time of admission of the Appeal, it is recorded that the ground Nos.1,5 and 8 raised substantial questions of law. The said grounds are as under :

1) Whether the lower Court is right in holding that no foundation was led by the Plaintiff for the purpose of holding that defendant No.1 executed the document of agreement of sale-deed on behalf of the joint family when the said facts were not at all in dispute and when it was specifically attempted by the Defendants that the said document was executed on behalf of the joint family ?

5) In any case whether the lower Court was right in ignoring the evidence of legal necessity which was provided for by the admissions of the Defendants in their written statement. In that the Defendants themselves have come out with the case that the joint family needed the funds and, therefore, the loan was taken.

8) Whether the circumstances of the case, the lower court was not bound to at least more than specific performance in respect of the one half share of Defendant No.1 in the suit land who executed the agreement of sale.

I have heard the learned Counsel appearing for the parties on the aforesaid substantial questions of law.

2. For appreciating the submissions made on behalf of the parties it is necessary to refer the facts of the case. The Appellant is the original Plaintiff and the Respondents are the original Defendants. In August 1971 according to the Appellant there was an agreement in favour of the Appellant to purchase entire Gat No.24 admeasuring one hectare 43 ares for consideration of Rs.7000/- in three phases from the joint family of the Respondents. On 2nd August 1971,

a sale deed was executed in favour of the Appellant by the deceased Bhola Khushaba the father of the Respondent Nos.2 to 4 in respect of one third share out of Gat No.24 admeasuring 47 ares against the payment of consideration of Rs.1500/-. On 14th January 1972 the Respondent No.1 Dattu executed a sale deed in favour of the Appellant in respect of one third share out of Gat No.24 admeasuring 47 ares and received Rs.2500/-. The father of the Respondent No.2 expired on 16th June 1972. On 24th August 1972 a registered agreement for sale was executed by the Respondent No.1 for himself and on behalf of the Respondent Nos.2 and 5 who were minors. By the said Agreement remaining portion of land of Gat No.24 agreed to be sold to the Appellant. The consideration mentioned in the agreement was Rs.3000/- out of which a sum of Rs.2500/- was paid at the time of execution of the agreement and possession was handed over to the Appellant and a clause was incorporated in the agreement that the sale deed will be executed after obtaining permission of the Competent Authority.

3. The Appellant filed a suit claiming injunction for protecting his possession as regards the property subject matter of the two sale deeds and for specific performance of the agreement for sale dated 24th

August 1972.

4. The suit was resisted by the Respondents by filing their joint written statement.

5. In the first part of the written statement, the case made out by the Appellant regarding agreement to sell the entire land in three phases was disputed. The Respondents also disputed that the Appellant was put in possession on the basis of the sale deeds and the agreement. A specific case was made out that the sale deeds were executed in favour of the Appellant as the Respondent No.1 and his deceased brother Bhola Khushaba were in need of money. According to the Respondents the documents were executed as a security for repayment of the loan advanced by the Appellant. A specific case is made out that the suit properties are properties of the joint family of the Respondents.

6. The Trial Court held that the Appellant has not established that the Respondent No.1 executed an agreement for sale on 24th August 1972 and handed over the possession of the property. However, the Trial Court held that the Appellant has proved that a sum of Rs.2500/- was paid to the Respondent No.1 on 24th August 1972. The Trial Court held that the

Respondents have failed to prove that the transaction between the parties was a loan transaction and the Deeds were executed as collateral security for loan. The learned Trial Judge dismissed the suit of the Appellant. An Appeal was preferred by the Appellant to the District Court. The District Court partly allowed the Appeal and granted prayer for perpetual injunction in respect of the remaining portion of Gat No.24 which was subject matter of the two sale deeds executed in favour of the Appellant. However, no relief was granted as regards agreement for sale and the property subject matter of the agreement for sale. The Appellate Court held that the suit agreement was executed. However, the Appellant has not proved that the possession was handed over under the suit agreement. The relief of specific performance was denied to the Appellant. The Appellate Court in paragraph No.9 of the Judgment held that the agreement for sale was executed by the Respondent No.1 in his capacity as Karta and the Appellant has nowhere stated that the said transaction was effected for legal necessity or for benefits of the the estate. The Appellate Court also held that the Agreement may not be binding on the Respondent Nos.2 to 5 and it is binding on the share of the Respondent No.1. The Appellate Court held that before the partition is effected each

coparcerner is entitled to the enjoyment of the whole property and Respondent no.1 cannot have specified interest in respect of any specific property and consequently no specific performance can be enforced. As far as the possession of the property subject matter of the agreement is concerned, the Appellate Court disbelieved the case of the Appellant on the ground that the agreement was executed only by the Respondent No.1 and therefore, the recitals therein were not binding on the Respondent Nos.2 to 5.

7. The learned Counsel appearing for the Appellant submitted that once two out of the three transactions were accepted by the Appellate Court, the decree for specific performance ought to have been granted, especially in the light of the finding recorded by the Trial Court on Issue No.5. He submitted that the Respondent Nos.2 to 5 had not disputed that the agreement was executed by the Respondent no.1 on their behalf and therefore the reasons given by the Appellate Court are perverse.

8. The learned Counsel for the Respondent supported the impugned Judgment and Decree. He submitted that there is no reason to interfere in the findings recorded by both the Courts below as regards claim of the Appellant for specific performance.

9. I have considered the submissions of learned Counsel appearing for the parties. It is pertinent to note that a joint written statement has been filed by the Respondents. In so far as the suit agreement is concerned, a specific contention is raised that the property bearing No.Gat No.24 is a joint family property. In the said written statement which is also filed on behalf of the Respondent Nos.2 to 5, there is no dispute raised as regards authority of the Respondent No.1 to execute agreement for sale. It is not the case of the Respondent Nos.2 to 5 that the Respondent No.1 had no authority to execute the agreement for sale as there was no legal necessity. The only defence is that transactions are executed as a security for repayment of loan. It is stated that the Respondents were in dire need of money and therefore, the loan transaction was entered into with the Appellant. Thus, the execution of the agreement is admitted and challenge to the agreement is only on the ground that same is executed as a security for repayment of loan. The Trial Court framed a specific issue being Issue No.5 on the said aspect and negatived the said contention of the Respondents. The Trial Court recorded a finding that the case made out by the Respondents in that behalf is not true. The Appellate Court has not set aside the said

finding. Thus, only defence raised by the Respondents is not established by them.

10. If the said finding on Issue No.5 is not disturbed, then it is apparent that the execution of the agreement is established. The Trial Court has also recorded a finding that the Respondent No.1 received a sum of Rs.2500/- from the Appellant on 24th August 1972 i.e. at the time of execution of the suit agreement. Thus, out of the total consideration of Rs.3000/- a sum of Rs.2500/- was paid by the Appellant. Perusal of the Judgment of the Appellate Court shows that the Appellate Court declined to grant decree for specific performance on the ground that the agreement for sale is not binding on the Respondent Nos.2 to 5. When a common written statement is filed by the Respondents and when the said case was not made out by the said Respondents, the Appellate Court could not have come to the conclusion that the agreement is binding only on the Respondent No.1. The agreement clearly provides that the Appellant was placed in possession of the remaining portion of Gat No.24 obviously because the other portion of Gat No.24 was already sold to the Appellant under two sale deeds in respect of which decree of perpetual injunction has been granted by the Appellate Court. The case of the Appellant was

disbelieved mainly on the ground that while executing the Agreement, the Respondent No.1 did not act as Karta and manager of the Hindu joint family and the recitals in the agreement for sale cannot be considered as admissions by the Respondent Nos.2 to 5.

11. Hence, even going by the findings of the Appellate Court which are not controverted and the fact that it was held that out consideration of Rs.3000/-, a sum of Rs.2500/- was paid by the Appellant, there is no reason to disbelieve the case that he was put in possession at the time of execution of the agreement. No circumstance is brought on record which will warrant the exercise of discretion under Section 20 of Specific Relief Act, 1963 against the Appellant. On the contrary, remaining portion of Gat No.24 is admittedly sold by the Respondent No.1 and deceased Bhola Khushaba to the Appellant No.1 under the two sale Deeds and under the agreement for sale executed by the Respondent No.1 on behalf of other Respondents, the substantial part of the consideration in respect of the other portion of Gat No.24 was paid by the Appellant.

12. The finding of the Appellate Court that the Agreement was not binding on the Respondent Nos. 2

to 5 is perverse as no such defence was raised by the Respondent in their written statement. Such finding is required to be upset in this Second Appeal.

13. Hence, a case is made out for grant of decree for specific performance in favour of the Appellant. The decree for injunction as regards property described in paragraph No.1-c of the plaint will have to be also granted.

14. Hence I pass the following order :

i) Appeal is allowed with no order as to costs.

ii) The decree passed by the Appellate Court is modified. The operative part of the decree passed by the Appellate Court will now read as under :

"The Defendants are perpetually restrained from interfering and obstructing the Plaintiff's possession and enjoyment of the suit land mentioned in the paragraph Nos.1(a), (b) and (c) of the plaint.

. "The Plaintiff shall deposit the balance consideration of Rs.500/- in the Court within a period of 18 weeks from 21st July 2004. On deposit of balance consideration, the Defendants shall

execute the conveyance in favour of the Plaintiff on the basis of agreement for sale dated 24th August 1972.

. On the failure of the Respondents to execute the conveyance, the Plaintiff will be at liberty to get the conyevance executed through Court Commissioner by executing the decree. In the event, the Plaintiff fails to deposit the balance consideration within the stipulated time, the prayer for specific performance will stand dismissed. There will be no order as to costs."

JUDGE